United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7131

To be argued by
RICHARD E. REPETTO

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

ATLANTIC & GREAT LAKES STEAMSHIP CORP.,

Plaintiff-Appellee,

—v.—

STEELMET, INC.,

Defendant,

—and—

TIDEWATER TERMINALS, INC.,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-7131

ATLANTIC & GREAT LAKES STEAMSHIP CORP.,

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—v.—

STEELMET, INC.,

Defendant,

—and—

TIDEWATER TERMINALS, INC.,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

Statement of the Case

This is an action by Atlantic and Great Lakes Steamship Corp. (hereinafter AGL) against Steelmet, Inc. and Tidewater Terminals, Inc. (hereinafter Tidewater) to recover damages arising out of the breach of a maritime contract, namely a voyage charter party for the vessel M.V. MARY.

The Complaint was filed on December 23, 1974, and after extensive discovery proceedings, trial was commenced and concluded before the Honorable Charles M. Metzner on July 14, 1976. (A. 2a).

On February 23, 1977 Opinion No. 45626 was filed awarding plaintiff judgment against defendant Tidewater only in the sum of $62,746.55, plus interest. On February 28, 1977 an amended judgment No. 77,322 was entered granting plaintiff recovery from Tidewater the total amount of $72,347.58, including interest. (A. 3a).

Tidewater filed its Notice of Appeal on March 9, 1977. Transmission of the record to the United States Court of Appeals for the Second Circuit was completed on April 21, 1977.

Issues Presented for Review

(1) Whether the finding of fact of the trial court, that a valid charter party contract did exist between AGL and Tidewater, is clearly erroneous.

(2) Whether the finding of fact of the trial court, that Tidewater breached the contract, is clearly erroneous.

(3) Whether the findings of fact of the district court, that AGL is entitled to a recovery of $62,746.55 as a reasonable adjustment of its foreseeable earnings lost as a result of Tidewater's breach, is clearly erroneous.

Statement of Facts

In September and October of 1974 Steelmet Export Corp. entered into negotiations with Empresa Siderugica Del Peru (hereinafter the receiver), which resulted in their entering into a contract for the purchase and sale of about 9,375 long tons of shredded scrap. (A. 67a). The terms of the contract called for shipment of the scrap from Jacksonville, Florida to Chimbote, Peru. The sale terms were

"C & F CHIMBOTE FREE OUT" (A. 176a), meaning that Steelmet was required to obtain and load the scrap on a vessel at Jacksonville and that the receiver was to arrange and pay for the discharge.

The price paid by the receiver was $118.50 per metric ton cost and $38.00 per ton ocean freight. (A. 174a, 85a).

In mid-November, 1974 Steelmet's subsidiary Tidewater sought to engage a vessel for the carriage of this cargo. Tidewater used its usual broker, Antraship in Montreal, to engage a vessel. (A. 21a).[1]

At this time AGL was the time-chartered owner of the M.V. MARY and had been operating the vessel since June, 1974. (A. 46a). AGL acted through its broker, A. L. Burbank & Co., and particularly through Mr. Arild Pettersen, a vice president of the company, manager of its chartering department and a chartering broker of some 25 years experience. (A. 32a).

The testimony of both brokers, Mr. Pettersen (A. 32a to 45a) and Mr. Ivar Traa of Antraship, acting for Tidewater (A. 91a to 105a), was heard in open court before the trial judge. This testimony confirms that, pursuant to Tidewater's request, negotiations were held over the phone between brokers from about November 18th, 1974 to November 20th. Various offers and counter-offers were made which culminated in an agreement between the brokers to all of the important terms of the contract.

On November 20th, 1974, Mr. Traa, acting for Tidewater, personally prepared identical telexes which were sent to both Pettersen and Tidewater in which he stated:

---

[1] According to the only representative of defendants who testified, Steelmet, Inc., Steelmet Export Company and Tidewater Terminals, Inc. were, "All the same company, public company, member of American Stock Exchange." (A. 66a).

"WE CONFIRM HAVING FIXED TODAY AS FOLLOWS ACC TIDEWATER TERMINALS, INC.

M/V MARY GREEK FLAG BLT 57
14783 DWAT
GLESS ORECARRIER, BRIDGE BETWEEN HATCHES 2 AND 3, ENG AFT
5 HOLDS/HATCHES BUT CARGO ONLY TO BE LOADED IN HATCHES 2-5
HATCH SIZES 2-5 IS 61'4" X 34"
374000 CFT CLEAR IN MAINHOLDS 2-5

9375 LT MINMAX SHREDDED SCRAP STOWING MAX 40/LT
1 SB JACKSONVILLE/1 SB CHIMBOTE
NOV 27/DEC 9 (PRESENT ETA NOV 28)

2500 LT LOAD/800 LT DISCH ALL PER WWDSHEX EIU
US 29, 25 PER LT FIOT, 95 PCT PPD
4500 DEM/HD LTS
NEGOTIATIONS AND EVENTUAL FIXTURE TO BE KEPT STRICTLY CONFIDENTIAL
SUB RECEIVERS APPR OF VESSEL LATEST 1600 HOURS NOV 21
OWISE GENJAPSCRAP SUB DETS 3, 75 TTL HERE."

Both telexes are reproduced in the Joint Appendix at pages 148a and 150a.

The terms of the message incorporated a Genjapscrap form charter party "sub dets (details)." This is a form of contract long used in the scrap trade and its general terms and conditions were known to all of the parties and the brokers. (A 37a, 39a, 40a, 48a, 26a, 68a, 100a).

In fact the brokers agreed to use a *particular* form of Genjapscrap charter, namely one previously concluded for

the vessel ATLANTIC FREEDOM dated November 8, 1972. (A. 39a, 100a, copy a p. 150a).

On November 21, 1974, the day after the fixture was sent, Mr. Pettersen received a copy of the ATLANTIC FREEDOM charter, reviewed it himself and with AGL. He later advised Mr. Traa that "as far as the owner (AGL) was concerned, there were no objections to the terms of the ATLANTIC FREEDOM charter party as applicable to our trade." (A. 39a, 40a). This agreement included specifically clause 33 of the form which provided that any extra insurance on account of vessel's age was to be for AGL's account.

The fixture telex stated that the fixture was subject to receiver's approval of the vessel latest 1600 hours November 21. Why Tidewater insisted on this provision has never been adequately explained, especially since the sale to the receivers was on a "C & F" basis.

AGL was informed on November 21st that receivers had not yet approved and a 24 hours extension of time within which to obtain the approval was agreed upon between the parties. (A. 41a, 92a).

On November 22, 1974 Steelmet Export Company and Tidewater Terminals, Inc. entered into a charter party wherein Tidewater undertook to (and did) carry the scrap cargo to Peru. (A. 164a—copy of charter and A. 80a-82a—testimony of Avraamides).

On November 26, 1976 Mr. Pettersen was first advised by Mr. Traa that receivers had turned down the vessel, presumably because of its age. (A. 41a-42a).

Mr. Avraamides, Charter Manager for Tidewater (A. 21a), and Export Manager for Steelmet Export, testified that at some time (perhaps November 22nd) he discussed

the vessels to be used for the cargo with representatives of the receiver. (A. 69a, 70a, 23a) and "offered them two ships", the M.V. MARY and the M.S. PROMETHEE, a vessel then on time charter to Tidewater (A. 162a).

Mr. Avraamides told receivers' representatives that the MARY would entail a penalty on extra insurance (A. 70a) but did not inform them that such penalty was for the account of owners under the proposed form of charter. (A. 79a).

He also testified that he told receivers that MARY was due in Jacksonville and "gave him the lay days which was constituting December 9 . . ." (A. 78a) Tidewater did not advise that the MARY had in fact given an estimated time of arrival at Jacksonville of November 28th, although this was the only "ETA" known to him. (A. 78a, 79a, 88a, 150a).

Next Mr. Avraamides testified that he notified Mr. Traa on November 22, 1974 that the receivers had not approved the MARY (A. 77a-78a) and that he then, on behalf of Steelmet Export, executed the charter party between Steelmet Export and Tidewater for the PROMETHEE on the same day (A. 80a).

On November 26, 1974 Mr. Avraamides dictated and sent a telex to the receivers (A. 82a) as follows:

> *"PLEASE BE ADVISED THAT WE ARE NEGOTIATING TWO (2) SHIPS.*
>
> A-A *M.V. MARY* BUILT 1957 ORE CARRIER, FIVE (5) HOLDS FIVE (5) HATCHES, ENGINE AFT BRIDGE MIDSHIP *READY TO START LOADING JACKSONVILLE APPROXIMATELY DECEMBER 8, 1974.*
>
> B-A *M.V. PROMETHEE* BUILT 1967, SINGLE DECK BULK CARRIER ENGINE/BRIDGE AFT

FOUR (4) HOLDS FOUR (4) HATCHES *READY TO START LOADING JACKSONVILLE NOVEMBER 29/30, 1974.*

AS OUR DISCUSSION WITH YOU MR. CESAR MOLINA, *WE ARE GOING TO CHARTER FIRM M.V. PROMETHEE DUE TO THE EARLIER LOAD AND NO PENALTY ON THE INSURANCE DUE TO SHIP'S AGE.* PLEASE, THEREFORE, CONFIRM IMMEDIATELY THAT YOU ARE ACCEPTING M.V. PROMETHEE AS WE HAVE TO FINALIZE NEGOTIATIONS TODAY." (emphasis added)

On November 27th Avraamides sent a follow-up telex to receivers in which he stated, in part:

". . . PLEASE URGENTLY ADVISE YOUR CONFIRMATION OF ACCEPTANCE PROMETHEE AS WE MUST CLOSE NEGOTIATIONS WITH OWNERS. . . ." (A.168a)

On November 28, 1974 the receivers replied to Steelmet Export that, since the sale was on C & F terms "WE CANNOT DECID [sic] ON VESSEL WHICH WILL CARRY THE MATERIAL." (A. 168a).

Tidewater persisted in its view, first expressed on November 26th that there was no contract. AGL was forced to reenter the market to find other employment and income for the vessel, and finding none, committed it to other voyages, all resulting in a loss. (A. 51a to 56a). Thereafter this action was instituted to recover its lost profits occasioned by Tidewater's breach.

POINT I

The Finding of the Trial Court That a Valid, Binding Contract Existed Between AGL and Tidewater Is Not Clearly Erroneous.

Tidewater argues, throughout Points I through V of its Brief on this Appeal, that the court erred in finding that the telex of November 20, 1974, taken in the context of the attendant negotiations, constituted a binding contract susceptible of a breach.

Tidewater presents a many faceted argument, but basically it argues that the agreement contains two (2) conditions precedent, neither of which were ever met. The first condition argued by Tidewater was that the fixture was subject to further negotiation as to the details of an already identified Genjapscrap contract form. Tidewater argues that since absolute agreement had not been reached on November 20, 1974 as to each clause of the Genjapscrap form, there could have been no meeting of the minds. This assertion is unsupportable, both on the facts and the law.

Both parties, AGL and Tidewater, were acting through their regular and almost "exclusive" brokers, who were familiar with their method of doing business. (A. 21a, deposition of Avraamides, A. 32a, testimony of Pettersen). All of the parties were familiar with the terms of the Genjapscrap form of charter. (A. 26a, 37a, 39a, 40a, 48a, 26a, 68a, 100a).

The fact is that Pettersen knew as of November 20th that his principals had previously contracted on that form of charter and that there were no unacceptable terms, based on his prior experience. (A. 39a-40a). Mr. Pettersen, knowing he had a "flexible" authority to bind AGL agreed to Tidewater's request for a "Genjapscrap sub dets" on

November 20th and thus bound his principal. There was, from the beginning, a meeting of minds on this point, which in fact was later confirmed in Pettersen's call to Traa on the 21st of November (A. 40a).

The trial court had before it pre-trial memoranda as to the parties' view of the applicable cases as well as the unique opportunity to listen and observe the principal witnesses for both Tidewater and AGL as to what the phrases "WE CONFIRM HAVING FIXED" and "OWISE GEN-JAPSCRAP SUB DETS" meant. This opportunity is unavailable to both this Court and Tidewater's present counsel.

While Tidewater argues in its brief that, on its view of the alleged conflicting testimony in the transcript, there was no meeting of the minds, the trial court resolved those supposed conflicts in favor of AGL.

This Court properly pointed out, in its second decision in *Interocean Shipping Co.* v. *National Shipping and Trading Corp.*, 523 F. 2d 527 (1975) at p. 535, that:

> "The resolution of this conflicting testimony as to the meaning of 'sub details' in the negotiations for the charter of the Oswego Reliance was the function of the district court as the trier of the facts, not the function of this Court. Our role is limited to holding, as we do, that our review of the testimony satisfies us that the district court was not clearly erroneous in finding that 'sub details' did not mean that a charter party had not been agreed upon."

The trial court's finding of a valid contract is also well supported by the testimony in this case. The November 20th telex was drafted by Mr. Traa himself, not by some inexperienced clerk in his office. (A. 101a).

Mr. Traa testified that he was experienced in chartering negotiations and in fixtures. His answers in the following colloquy on cross-examination are clear beyond doubt.

"Q. What does the word 'fixed' mean in the chartering field?
A. It's a fixture.
Q. Would you describe a fixture, please?
A. It's an agreement, a contract.
Q. A fixture is a contract?
A. Yes." (A. 101a)

Mr. Traa's telex of November 20th, sent to the parties, states at its outset, "WE *CONFIRM* HAVING FIXED TODAY AS FOLLOWS. . ." (emphasis added.)

Mr. Pettersen had the same conception and understanding of the meaning of the word "fixed." He testified (A. 36a) that "The word 'fixed' means a finalization or a *completion* of negotiations." (emphasis added.)

The November 20th telex was received and accepted by both parties without any objection to the words "We confirm having fixed. . .".

These words of agreement are not unknown to this Court. A fixture is binding on the charterer and the owner and arises when a broker, in any manner, affirms (or confirms) that the vessel is fixed. *Christman* v. *Maristella Compania Naviera*, 349 F. Supp. 845 (S.D.N.Y. 1971), aff'd. 468 F. 2d 620 (2 Cir. 1972), per curiam upon the district court opinion.

The trial court heard all of the arguments raised in Tidewater's brief. Mr. Avraamides staunchly denied the existence of a fixture. Mr. Pettersen and Mr. Kerwin of AGL both testified with the benefit of notes they had made during the negotiations and the fixture. (A. 37a to 39a, 52a, 53a). Neither Avraamides nor Traa kept such notes.

Obviously, the credibility of the four witnesses was at issue in the trial, particularly as to the understanding of the November 20th telex. The trial court was able to resolve this issue and did so in favor of AGL and this finding cannot be casually reversed.

Again, as noted by this Court in the *Interocean* decision (supra, at p. 534):

> "The court's findings were based in large measure on its resolution of issues of credibility with respect to witnesses called by both sides. The task of resolving conflicting testimony is peculiarily within the province of the trial court. In the Matter of Grace Line Inc., 517 F.2d 404, 406-07 (2d Cir. 1975); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 980 (2d Cir. 1942)."

The second "condition precedent" to the contract asserted by Tidewater is the requirement of the approval of the receivers, and that such approval was not given.

Tidewater also argues that it was under no duty to guarantee or obtain receivers' approval. It is AGL's position, as detailed in POINT II of this Brief, that once the fixture was made, Tidewater assumed a duty to bring about performance and were under a duty to not prevent such performance.

The trial court held that receivers were never asked to accept the MARY. This finding is not clearly erroneous. The only direct evidence of what receivers did or did not do is contained in the deposition of Javier A. Zegarra Zavaleta (A. 14a). This deposition on written interrogatories propounded by Tidewater's trial counsel more than one year after the suit was commenced, does not contain any direct reference to either MARY or PROMETHEE.

On the contrary Mr. Zegarra's answers indicate only that receivers were interested in the timing of the shipment and not the vessel.

The only questions relating to the choice of vessel were as follows: (A. 16a-17a).

"Q. If you answered the previous interrogatory 'yes', please describe fully and completely the conversation with Mr. Avraamides concernding the selection of a ship to carry Siderperu's cargo?

A. Due to the purpose of our trip and according to the the instructions of the O/C, we insisted on having the material shipped as soon as possible, for it was needed at our enterprise.

Q. Specifically, did Mr. Avraamides tell you and Mr. Molina that two ships were available to carry the cargo?

A. We were told that two vessels which were about to reach port would be available, and that the material would be shiped at the end of the month or early December at the latest.

Q. Specifically, did you or Mr. Molina tell Mr. Avraamides to ship the cargo aboard the vessel which would arrive first in Chimbote?

A. Yes, for the purpose of our trip was to check the material and to demand that the shipping date would be complied with. We tried to make this the earliest possible date."

Mr. Zegarra's testimony that receivers only asked for whichever vessel would first arrive in Chimbote is in sharp contrast with Mr. Avraamides often repeated assertions, both in his deposition and at trial, that receivers' had affirmatively chosen the PROMETHEE. (A. 22a, 23a, 25a, 70a, and 83a).

It must be noted that Mr. Zegarra did not directly remember discussing the vessels with Mr. Avraamides. He recalled only Robert M. Waisfisz by name. (A. 16a). Also, in his telex to receivers of November 26th, wherein Mr. Avraamides attempted to confirm the alleged agreement, he referred only to "OUR DISCUSSIONS WITH YOU MR. CESAR MOLINA. . .". (A. 167a). In his deposition, which was taken prior to the time the interrogatories were sent to receivers, Mr. Avraamides indicated that his discussions were with Mr. Molina. (A. 28a).

It appears, then, that Mr. Molina would have been in a better position to sustain Tidewaters allegations, yet he was never called to testify, either orally or in writing. It has long been held that the non-production of material evidence raises an inference that the evidence is unfavorable. To paraphrase Judge Weinfeld's decision in *Travelers Indemnity Co.* v. *S.S. POLARLAND*, 418 F.Supp. 985 (1976), at p. 988:

> "Since his testimony would upon the facts here presented have been cumulative to the testimony of [Zegarra], the failure of defendants to present his testimony by way of deposition or upon the trial permits an inference that his testimony would have been adverse to [Tidewater] as well as to the other defendants."

See also *J. Gerber & Co.* v. *S.S. SABINE HOWALDT*, 437 F.2d 580, 593 (2d Cir. 1971).

Tidewater asserts that receivers rejected the vessel for one or two reasons. The first is the overage insurance and the second, time of arrival at Jacksovnille to load.

As to the trial court properly noted, "Not only was [receivers] not asked to approve the MARY, but the asserted

reasons for choosing the PROMETHEE did not exist." (A. 142a).

Mr. Zegarra's testimony does not state that he was either asked to choose a specific vessel or that he did so. The receivers reply of November 28, 1974 to Steelmet Export (A. 168a) shows that receivers would not make such a decision.

Of more importance, however, is the fact that Avraamides, acting for both Tidewater and Steelmet, misrepresented the MARY to the receivers.

Avraamides stated that the MARY would entail a penalty on extra insurance (A. 69a-70a) but did *not* point out that such insurance would be paid by AGL and/or deducted from freight under the terms of the agreed ATLANTIC FREEDOM Genjapscrap charter. (A. 79a).

As to which vessel would arrive first, Avraamides testified that he only told receivers what the charter party lay days and cancelling dates were for MARY "November 27, 28, December 9," and gave an ETA for the PHOMETHEE of "end of November".

At the time of this alleged conversation, Tidewater's only information as to the MARY's ETA was contained in the November 20th fixture telex where the lay days were described as "NOV 27/DEC (PRESENT ETA NOV. 28)". (A. 150a). Avraamides admitted that at no time did he advise receivers that MARY's ETA, as of November 20-22, was November 28.

On November 26, Avraamides telexed receivers and then described MARY as "READY TO START LOADING JACKSONVILLE APPROXIMATELY DECEMBER 8, 1974." (A. 166a). This was an obvious misrepresentation of the facts as they were then known. (A. 79a).

It is interesting, however, to note that Avraamides did use the Nov. 28 ETA in calculating his voyage estimates for the MARY. (A. 88a, 186a).

Tidewater seeks to excuse this misrepresentation by asserting that there were rumors that the vessel was going to dry dock. (A. 82a). As noted in the docket sheets (A. 2a) Tidewater took the testimony of Lloyd's Register of Shipping representatives prior to trial in order to attempt to prove this. These depositions were never produced at trial nor were the Lloyd's representatives called as witnesses. The conclusion is clear that these "rumors" were unfounded and were created by Tidewater to mask a blatant breach of contract.

The evidence, as found by the trial court, is clear that Tidewater intentionally misrepresented the MARY in order to induce receivers to actively reject the vessel so that their own vessel could perform.

The evidence is equally clear that the receivers were not asked to approve, and neither approved nor disapproved the vessel.

Tidewater claims that the trial court's finding to this effect was based on "multiple hearsay". This is in reference to the exchange of telexes between AGL and its agent in Peru. (154a, 156a, 158a and 160a). These telexes were received in evidence over Tidewater's objection, subject to connection. (A. 49a-51a).

The "connecting" evidence is contained in receivers telex of November 28 (A. 168a) wherein their reply is identical to the alleged hearsay, i.e., that since it was a "C and F" sale, they would not select the vessel.

A further connection is found in a reading of Steelmet's telexes to receivers (A. 166a, 168a) and of Mr. Zegarra's answers to his deposition. (A. 14a).

The Court, having heard all of the witnesses, concluded that the condition claimed by Tidewater was never a true condition precedent and was not unfulfilled. The decision

is not clearly erroneous and is supported by more than sufficient competent evidence.

As Tidewater's brief points out:

> "Appellate courts generally will not overturn a finding of fact by the lower court judge in a civil non-jury case, where hearsay was improperly admitted *so long as there is sufficient competent evidence to support it.*" Weinstein and Berger, *Evidence*, § 800[03] (p. 800-17).

The facts in this case closely resemble those before the United States Court of Appeals for the Third Circuit in *Gardner* v. *The CALVERT*, 253 F. 2d 395 (1958), cert. denied, 356 U.S. 960, 78 S. Ct. 997. As the Court noted therein, at p. 399:

> "In the present case the testimony was sharply conflicting. It is quite evident that the district court credited the libelant's witnesses and not those for the respondents. Since there is support in the evidence for the finding of the district court that an oral contract of charter was made, that finding may not be stamped as clearly erroneous and it must be affirmed. McAllister v. United States, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20."

POINT II

The Finding by the Trial Court That Tidewater Had Breached the Contract Is Not Clearly Erroneous and Is Supported by the Evidence.

After considering all of the testimony and exhibits presented in evidence, including a post trial memorandum by defendant dealing with the merits of its defense (A. 124a) as well as, as requested, damages only (A. 105a), an experienced trial judge held, "The conclusion is inescapable

that the telexes from Steelmet Exort to Sider after November 25 were a charade to cover up the fact that defendants wanted the business and sought to get out from under a binding contract. Tidewater is liable for breach of the charter party with plaintiff." (A. 143a).

Even assuming that there was a true condition that the contract with AGL was subject to receivers approval, Tidewater breached its legal duty to cooperate in obtaining such approval and its duty to do nothing to hinder the granting of such approval.

As stated in *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. U. Local,* 222 F. Supp. 125, 130 (E.D.N.Y. 1963):

> ". . . It requires no citiation of authority for the proposition that every contract contains an implied covenant of good faith and fair dealing; a covenant not to do anything that will destroy or injure the right of the other to receive the fruits of the contract; a covenant or implied obligation to cooperate with the other so that he may obtain the full benefits of performance . . ."

The evidence indicates that Tidewater, acting in concert with Steelmet Export breached these implied duties and actively worked to hinder the "approval" of the M.V. MARY, by misstating the facts as to her ETA and overage insurance.

Tidewater, in order to find employment for its own "open" vessel, M.V. PROMETHEE, (A. 24a) offered both vessels to receivers simultaneously. The receivers neither rejected nor approved either vessel, but only stated that they would prefer the shipment to go on whatever vessel could load first.

It is submitted that Tidewater had no right to offer another vessel along with the MARY. In effect, they created a situation where AGL's vessel was to compete with Tidewater for a contract despite the fact that Tidewater had fixed the MARY. The misrepresentations made by Tidewater were intentional. This is direct hindrance in the performance of a contract.

It is clear that Tidewater and/or Steelmet Export pushed their own vessel on the receivers for their own purposes, particularly to appropriate the benefits of the carriage contract to bring the scrap to Peru for their own use and to deprive AGL of that contractual right.

That this is an actionable breach by Tidewater of AGL's contractual rights is clearly stated in the decision of the Court of Appeals of California in *Colwell Co.* v. *Hubert,* 56 Cal. Rptr. 753, 759 (Ct. App. 1967) where the Court stated:

> "This finding that defendant acted in bad faith brings into focus the well established principle that, 'In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.' (*Universal Sales Corp.* v. *Cal. etc. Mfg. Co.*, 20 Cal. 2d 751, 771, 128 P. 2d 665, 677; *Brown* v. *Superior Court,* 34 Cal. 2d 559, 564, 212 P. 2d 878; *Van Houten* v. *Whitaker,* 169 Cal. App. 2d 510, 516, 337 P. 2d 900.) 'This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render perfomance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose. [Citations.]'

(*Harm* v. *Frasher*, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367, 374.)"

See, also, *Concrete Specialties* v. *H. C. Smith Construction Co.*, 423 F. 2d 670 (10th Cir. 1970); *Van Valkenburgh, Nooger & Neville, Inc.* v. *Hayden Publishing Co., Inc.*, 30 N.Y. 2d 34, 330, N.Y.S. 2d 239 (1972); *Application of Hegliger*, 39 App. Div. 2d 698, 332 N.Y.S. 2d 698 (1st Dept. 1972).

The testimony of Tidewater's "exclusive" broker indicates that even Tidewater recognized that it had some duty to obtain the receivers approval.

Mr. Traa testified as follows: (A. 92a).

"Q. What did you hear next from Mr. Avraamides?
A. It was the next day. I presume it must have been before lunch.
Q. Which day are you talking about?
A. That would be the 21st of November. Then he said he didn't have the receiver's approval yet. Then we talked back and forth, and I said that maybe we can get an extension on this. He said, 'Yes, I would agree to an extension if the owners would agree to an extension.' So I went to Pettersen and he agreed to an extension until the next day."

Tidewater's main defense in this action is that it is not liable on the contract because the condition precedent, namely receivers' approval was not met. However, it is also clear that assuming that receivers did not approve of the MARY, this was because the ETA and insurance were misrepresented and they were offered Tidewater's vessel in preference to the MARY. Since Tidewater actively brought about the disapproval of the vessel for its own

benefit it cannot assert this disapproval, if in fact there was such a disapproval, as a defense.

As held in *Samuel Baum & Sons, Inc.* v. *Educational Alliance,* 172 N.Y.S. 2d 1015, 1018 (Sup. Ct. 1958):

> " . . . In all contracts there is an implied undertaking by each party that he will not do anything to prevent the other party from carrying out the agreement on his part; and a party cannot insist upon a condition precedent if he has prevented its performance; for he is then precluded from asserting it as a defense to an action upon the contract . . . and this includes doing anything that prevents the other party to a contract from earning his fees or agreed compensation. . ."

In *Alois* v. *Waldman,* 219 Md. 269, 149A 2d 406 (Md. 1959) the principle was stated as follows:

> "It is well settled that, where cooperation is necessary to the performance of a condition, a duty to cooperate will be implied, and that a party owing such a duty cannot prevail if such failure operates to hinder or prevent performance of the condition."

The cases illustrating this rule are legion, and include, in addition to those cited above, *United States* v. *United Engineering and Contracting Co.,* 234 U.S. 236, 58 L .Ed. 1294 (1914); *Spanos* v. *Skouras Theatres Corporation,* 364 F. 2d 161 (2d Cir. 1966); *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.,* 361 F. 2d 791 (6th Cir. 1966); *Kooleraire Service and Installation Corp.* v. *Board of Education,* 28 N.Y. 2d 101, 230 N.Y.S. 2d 46 (1971).

It is submitted that Tidewater intentionally substituted its own vessel for the MARY and accordingly breached its duties and obligations under the fixture and should be

liable for AGL's loss of the benefits of the contract of charter.

Tidewater argues that it had no motive to take over the Jacksonville/Chimbote cargo, because there were more lucrative cargoes available to it out of the Great Lakes. (A. 73a, 99a, 105a; Brief p. 25). However, there was a great deal of other evidence available to indicate that Tidewater and/or Steelmet had a purpose in taking over the Chimbote cargo.

First, Mr. Avraamides testified that at that time, the PROMETHEE was the only vessel on charter to Tidewater or Steelmet. (A. 90a, 91a).

Second, the vessel was "open" at the time.

Third, the freight rate invoiced to, and paid by, receivers on the Chimbote cargo was $38.00 per ton. (A. 85a, 174a).

Fourth, Avraamides had testified that his cost per ton to move the cargo to Chimbote, including the ballast leg from Detroit was $26.42 per ton and if the ballast leg back to Port Everglades was included, $32.96 per ton. (A. 74a). Thus, with 9375 long tons (or 9525 metric tons) loaded, at a freight of $38.00, Tidewater ended up with the vessel back in Port Everglades with a net profit of $48,006.00 and the vessel ready to load a cargo of scrap, in which Steelmet had an interest, for discharge in Egypt. (A. 90a).

It is clear that Tidewater had chartered the vessel to the Egyptian receivers during the negotiations with AGL (A. 77a). Tidewater held the MARY open under the alleged condition of "receivers approval" until it could firm up negotiations on another sale of scrap and subcharter of the PROMETHEE to consummate a "package deal", all to the benefit of Tidewater and to the detriment of AGL.

Thus, the same profit motive as noted by this Court in the *Interocean* case (supra, at p. 533, n. 5) is present here.

AGL respectfully submits that the decision of the trial court that there was a deliberate breach of contract is not clearly erroneous, but, on the contrary, is well supported by the facts and the inferences properly drawn therefrom.

POINT III

The Finding of the Trial Court That AGL Is Entitled to a Recovery of $62,746.55, As a Reasonable Adjustment of Its Lost Profits, Is Not Clearly Erroneous, and Is Supported by the Evidence.

It is interesting to note that Tidewater, in POINT VI of its brief on Appeal, does not disagree with the applicable law, as set forth in AGL's post-trial brief (A. 106a-123a), and cites no cases in opposition.

The guidelines to be followed by the Court in reviewing a trial court's determination of damages have long been set in this circuit. In a *per curiam* decision of this Court in *Venus Shipping Co.* v. *Wilson,* 152 Fed. Rep. 170, 81 C.C.A. 368 (1907), it was noted:

> "The case involves the question of the probable loss sustained by a shipowner through losing the net earnings of a vessel upon a voyage which was abandoned, and inquiry which generally presents difficulties, because its solution depends upon various contingencies of navigation more or less speculative and incapable of being accurately ascertained. In such cases approximate accuracy is all that can be reasonably expected."

Later, this Court held in *United Transp. Co.* v. *Berwind-White Coal-Mining Co.,* 13 F. 2d 282 (1926), where appellant disagreed with the damages, that:

"Remembering (as was said in the Venus Case) that 'approximate accuracy is all that can be reasonably expected', we have gone over the commissioner's report and think appellant's complaints baseless.

The questions in such a case are these:

(1) How much would the shipowner have made under the canceled charter *if all had gone well; if no casualty had occurred, and no extra-ordinary expense been encountered?*

(2) How much did the charterer make under the substitute charter, the circumstances being what they actually were?

The basic facts ascertained, and it appearing that the substitute charter represented a loss, it is the business of the court to grant as solatium to the injured shipowner the difference between what he did earn and what he would have earned during the time that would have been required to fulfill the charter of which he was wrongfully deprived. The computation and adjustment of such a matter is not a scheme of absolute certainty, but the inaccuracy must be plain, and plainly injurious, to move any court in favor of the original wrongdoer, i.e., contract breaker. We are not so moved in this case." (at pp. 283-284) (emphasis added)

Tidewater, in making its calculations in both its post-trial memorandum and its Brief on Appeal have taken pains to avoid this Court's ruling in *United Transp. Co.* (supra) that the calculations are to be based on what would have been realized under the cancelled charter *"if all had gone well; if no casualty had occurred, and no extra-ordinary expense been encountered."*

Tidewater, on the contrary, has attempted to read into the charter every conceivable delay, peril of the sea, in-

cluding adverse wind, weather and current, engine breakdown, and stevedore delay.

In making its calculations, which were reviewed and approved by the trial court (A. 144a), AGL used the most conservative estimates possible, based on the evidence. For instance, a ship speed of 11 knots was estimated despite Mr. Kerwin's testimony that on previous voyages "from time to time, particularly with the following current, the speed would exceed 11 knots." (A. 60a).

Further an in port fuel consumption of 7 tons per day was used, although Kerwin had testified that such consumption had varied "from *3* to 7 tons per day." (A. 59a).

Also, AGL's calculations have rounded off all part days to full days, increasing the duration of the anticipated voyage and thus decreasing the anticipated profit.

The arguments raised by Tidewater on this Appeal were all raised before the trial judge, who resolved them in AGL's favor. This was clearly the function of the trial court and not of this Court.

Tidewater argues that the costs at Jacksonville were understated and basically argues that, had it loaded the MARY, it would have been under no duty or economic pressure to expedite the loading. The evidence and reasonable presumptions to be drawn therefrom are to the contrary. First, the fixture required a loading rate of 2500 long tons per day. Second, the testimony is clear that the receiver was in a hurry for the goods (A. 16a, 176a at p. 6 of English Translation). It is reasonable to assume that Tidewater and Steelmet Export would have loaded with due dispatch to keep their customer happy, especially since Steelmet had delayed the original time for shipment under the contract. (A. 67a).

Tidewater argues that the MARY's steaming time was overstated and seeks to prove this by an analysis of her actual time used from Mobile to Matanzas (Brief, p. 38-39). There is no evidence in the record, however, as to what the actual weather conditions and currents were. Without this evidence, Tirewater's calculations are nothing more than bare speculation, which the trier of fact chose to disregard.

It is submitted that by "rounding off" all days at sea to full days, AGL has more than adequately compensated for any reduction in steaming time below 11 knots.

Tidewater also argues that AGL underestimated port charges at Chimbote. The only evidence in the record was the estimate of Mr. Kerwin of AGL, based on his prior experience with 3 other vessels at Chimbote and the testimony of Mr. Avraamides (A. 47a; 76a). As noted above, the test for establishing damages is not absolute accuracy, and, ". . . the actual amount of the lost profits . . . may be estimated from the facts in evidence, including the inferences to be drawn from them and the probabilities which they suggest." *Gardner* v. *The CALVERT* (supra, at p. 399).

It appears that the trier of the fact, after listening to the testimony of both parties, chose to accept AGL's estimates. This is a finding of fact within the purview of the trial judge and his conclusion is not "clearly erroneous."

As stated in *Mitsugi Nishikawa* v. *Dulles*, 235 F. 2d 135, 140 (9th Cir. 1956), reversed on other grounds, 356 U.S. 129, 78 S. Ct. 612 (1958).

> "The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness."

See also. *N. L. R. B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (5th Cir. 1953), affirmed sub-nom. *Howell Chevrolet Co.* v. *N. L. R. B.*, 346 U.S. 482, 74 S. Ct. 214, 98 L. Ed. 215 (1953); *Chow Sing* v. *Brownell,* 217 F.2d 140, 143 (9th Cir. 1954); *Lew Wah Fook* v. *Brownell,* (9th Cir. 1955) 218 F. 2d 924. This rule is particularly true where the witness is interested in the outcome of the case, or where his testimony is improbable or contains patent omissions and inconsistencies. *Quock Ting* v. *United States,* (1891) 140 U.S. 417, 420 11 S. Ct. 733, 35 L. Ed. 501. See also *Joseph* v. *Donover Co.*, 261 F. 2d 812, at 824 (9th Cir. 1958).

Tidewater further disputes AGL's estimates of the time it would take to discharge at Chimbote. Tidewater's argument, like the ones made at trial, turns on its attempt to equate charter party allowed laytime with the time that would actually be used. This is not a proper use of allowed laytime, which is used merely for computing demurrage or dispatch.

In fact, Tidewater's own witness, Mr. Traa, stated that there was no such equation.

> "Q. Is there any real relation between allowed lay time, exclusions from lay time, and the actual calendar time that a vessel stays in port?
> A. There is no direct relation to it." (A. 102a).

Tidewater also argues that, while it admits receivers worked the PROMETHEE around the clock and on holidays and Sundays, there is no evidence that the same would have been done for the MARY. (A. 90a; Brief p. 42-43). This argument is patently without merit.

Regardless of which ship performed, receivers would have been obligated to discharge as fast as possible or pay demurrage. Further, Mr. Zegarra's testimony was that the material was needed at receivers enterprise. (A. 16a). The

sales contract with Steelmet Export provided, in one of the "Purchasing Conditions" annexed to the Purchase Order that,

> *"6. DELIVERIES*
> Time being one of the fundamental conditions of this order, we reserve the right to cancel same in whole or in part, in case the deliveries should not be made in the time and manner specified." (A. 176a, at p. 6 of English Translation).

Since the loading date had already been delayed, (A. 67a) it is more than reasonable to assume that any vessel used would have been loaded and discharged as quickly as possible.

As regards overtime, Tidewater neglects to mention that the sales contract also provides that the receivers were not only to maintain a minimum tonnage per day on discharge, but also were to bear the cost of discharge (Free Out). (A. 174a, 176a, 178a).

It is submitted that all of Tidewater's arguments about estimated voyage times and expenses are based upon a misuse of the laytime provisions of the Genjapscrap charter and upon the wrongful premise that the MARY would have encountered the worst possible conditions at sea and at the loading and discharge ports. Such a premise clearly flies in the face of this Court's instruction that the test for estimated damages from such a breach of contract, is what the owner would have made, *"if all had gone well; if no casualty had occurred, and no extraordinary expense been encountered" United Transp. Co.* v. *Berwind-White Coal Mining Co.* (supra, at p. 283).

Finally, Tidewater persists in arguing that the cost of a theoretical ballast voyage from Chimbote to the U.S. Gulf must be included as part of AGL's expected voyage ex-

penses. This argument is again bare speculation, and was rejected by the trial court. (A. 144a).

As noted, the contract ended at Chimbote upon completion of discharge. There is no way of even guessing what further business may have become available on the West Coast of South America between the proposed loading at Jacksonville in November, 1974 and the estimated completion of discharge on January 2, 1975.

The trial court had before it the testimony of both Mr. Pettersen (A. 34a) and Mr. Kerwin (A. 47a, 48a) that AGL had uncompleted contracts of affreightment from the West Coast of South America, and could have been able to negotiate for a cargo from there during the time it would take to perform the Jacksonville/Chimbote movement.

It is submitted that a proper estimated voyage accounting includes only the ballast leg, if any, to the loading port. In anticipating costs during negotiations for a voyage charter, the owner knows where his vessel is. He does not know what future business may develop during performance. Any ballast leg *after* discharge must, therefore, be added only to the estimate for the next voyage.

It is ludicrous to imagine any owner or time chartered owner making an estimate that includes a ballast leg *to* the loading port and a ballast leg *from* the discharge port on a single voyage charter, such as the contract herein.

Tidewater claims that AGL failed to mitigate its damages since, after the Tidewater charter was breached, the MARY "was not employed on the market", but was used on other in-house contracts of affreightment.

As a time charterer, AGL had to pay daily hire to the true owner whether it employed the vessel or not. Tidewater's arguments disregards the testimony of Mr. Petter-

sen, AGL's broker, that he had canvassed the market but was unable to come up with any employment for the MARY (A. 42a) and the testimony of Mr. Kerwin to the same effect. (A. 52a). It should be noted that even Tidewater's vessel PROMETHEE had been "open" at the time. With no business on the market, AGL was forced to use MARY on whatever contract it could, to at least keep some cash flowing for payment of hire. As it turned out, this resulted in a loss.

It is respectfully submitted that the estimates of the lost profits to AGL accepted by the trial court are reasonably accurate, based on the evidence produced, the inferences to be drawn therefrom and the probabilities suggested.

SUMMARY

It is respectfully submitted that the record is replete with evidence to support the findings contained in Judge Metzner's opinion after trial. Tidewater has not succeeded, as it must, to find any substantial error in the trial court's findings or conclusions.

Rule 52(a) of the Federal Rules of Civil Procedures for the United States District Courts provides, in part, that as to actions tried without a jury:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . .".

In an often quoted case, Mr. Justice Reed speaking for the United States Supreme Court in the case of *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), states:

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Clearly then, the trial court's finding as to the critical facts in this case may not be reversed. Accordingly, defendant-appellant, Tidewater, cannot prevail in its contention that it is not liable to plaintiff, AGL, for the breach of the contract and the lost profits occasioned thereby.

CONCLUSION

The Judgment Entered Herein Should Be Affirmed With Costs to the Appellee.

Respectfully submitted,

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Brief

IS HEREBY ADMITTED

THIS 16 DAY OF June 1977

at 12:30 P.M.

Donald F. Mooney

By: ~~Eugene~~ Eugene J. O'Connor Jr.

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